

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 08-13555-scc

4 Adv. Case No. 08-01420-scc

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6 In the Matter of:

7 LEHMAN BROTHERS, INC.,

8 Debtor.

9 - - - - - x

10 SECURITIES INVESTOR PROTECTION CORPORATION, et al.,

11 Plaintiffs

12 v.

13 LEHMAN BROTHERS, INC.,

14 Defendant.

15 - - - - - x

16

17 U.S. Bankruptcy Court

18 One Bowling Green

19 New York, New York

20

21 April 27, 2015

22 2:03 PM

23 B E F O R E :

24 HON SHELLEY C. CHAPMAN

25 U.S. BANKRUPTCY JUDGE

1 Hearing re: Spanish Broadcasting Discovery Conference

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3 Hearing re: Doc#29323 Three Hundred Twenty-eighth Omnibus

4 Objection to Claims (No Liability Claim) Solely as to

5 Certain Claim

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25 Transcribed by: Nicole Yawn

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P R O C E E D I N G S

UNIDENTIFIED SPEAKER: Good to see you, Jess.

THE COURT: First of all, again, I'm so sorry for
the law firm's loss --

UNIDENTIFIED SPEAKER: Thank you.

UNIDENTIFIED SPEAKER: Thank you.

THE COURT: -- today. And thank you for coming
down nonetheless.

So I've read everything that you had to say. And
I really want to try to take it above the level of the
bickering that is obvious in terms of who's responsible for
the delay, because I don't know where we'd go with that. So
I want to try to just have a productive, definitive
resolution of the issues with a firm deadline to complete.

I don't really know what else to do with the past.
We could reiterate it. It does seem as -- the one thing --
so, having said that, now I'll lead into it.

I don't understand. There were agreed search
terms. And then, -- right? There were agreed search terms,
right?

UNIDENTIFIED SPEAKER: Yes, Your Honor.

THE COURT: Yeah. And then, -- no?

MS. PRIMOFF: My colleague, Mr. Joe Otchin is
going to handle the hearing.

THE COURT: Okay.

1 MS. PRIMOFF: But I will address it.

2 THE COURT: At one point, there were agreed terms
3 for the (indiscernible).

4 MS. PRIMOFF: But the agreement was always subject
5 to a condition that, if the search turned out to be
6 problematic --

7 THE COURT: Okay. But then, we get -- okay. So
8 that's point one.

9 Point two is we get into the length of time. To
10 me, if you agree on -- tentatively agree on -- search terms
11 on day one, on days seven to ten, you should come back and
12 say those search terms were (indiscernible). It then
13 appeared that there was a very long period of time that it
14 took to get back and say those search terms were wrong (ph).
15 So that's problematic.

16 UNIDENTIFIED SPEAKER: Yes.

17 MR. MILLER: Your Honor, if we could sort of set
18 the table, as you say, a little bit. Because I think the
19 plan administrator -- well, first of all, I appreciate your
20 time today.

21 For the record, I'm Ralph Miller, from --

22 THE COURT: Okay. And I do -- unfortunately, I'm
23 going to have a hard stop in a half an hour.

24 MR. MILLER: Okay.

25 THE COURT: Because I have to go up and do

1 Judge River's (ph) class at Columbia.

2 MR. MILLER: Okay. We can be very quick,
3 Your Honor. And, to actually move things faster, we pulled
4 together a few extras of what we think are key points about
5 this matter.

6 THE COURT: Do these folks have it?

7 MR. MILLER: They're getting copies of them right
8 this minute.

9 THE COURT: Okay.

10 MR. MILLER: But these are all things from the
11 record. Tab 1 of this, Your Honor, is a supplemental brief
12 that outlines what the claims components are because there
13 are different issues here --

14 THE COURT: Correct.

15 MR. MILLER: -- on these different components.

16 THE COURT: Sure.

17 MR. MILLER: There is a -- the largest component
18 is this \$39.6 million --

19 THE COURT: Right.

20 MR. MILLER: -- for diminution in investment
21 capital. And then, there's about 10 million in damages.

22 THE COURT: In the classic swap settlement amount
23 of damages, right?

24 MR. MILLER: Yeah. Well, actually, this is a
25 little more complicated. They owed money to LBSF, another

1 Lehman debtor.

2 THE COURT: Right.

3 MR. MILLER: And they said they would have paid \$6
4 million if they'd gotten this \$10 million draw, which is
5 what this case is all about in 2008. And instead, for the
6 next 18 months, they let that ride, and it got to be worth a
7 lot more money.

8 The important point, though, Judge, is they're
9 saying that 6 million of the 10 million is going to be used
10 on the swap and 4 million that was left over was what
11 produced this almost \$40 million in loss. So they have a
12 ten to one multiplier effect that they are seeking here on
13 this not having \$4 million for a particular period of time.

14 And to pay it back. It's not a gift.

15 So, if you look at the next tab, this was --

16 UNIDENTIFIED SPEAKER: Excuse me.

17 MR. MILLER: We're looking at these exhibits,
18 which we're now seeing for the first time sitting here.
19 These have nothing to do with the discovery of this
20 (indiscernible). We --

21 THE COURT: Okay. Here's the thing. Okay? From
22 the papers, it seemed to me that the fact that SBS is
23 claiming the 39 million in damages creates an expanded scope
24 of discovery. It's a consequential damage claim.

25 MR. MILLER: We don't concede that. We --

1 THE COURT: Well, it's not a swap termination.

2 MR. MILLER: Of course not. No, no, we're not
3 here on --

4 THE COURT: So I'm not seeking to attach
5 significance -- if the sticking point is characterizing it
6 as consequential damages because you don't want to concede
7 the legal argument about that, then I'll call it something
8 else.

9 MR. MILLER: Okay.

10 THE COURT: Okay?

11 MR. MILLER: Yes.

12 THE COURT: If that makes it easier.

13 MR. MILLER: Yes.

14 THE COURT: I'm not seeking to do that. The other
15 damages --

16 MR. MILLER: Yes, okay.

17 THE COURT: You're seeking other damages. So you
18 need to produce documents that relate to the other damages.

19 MR. MILLER: Yes.

20 THE COURT: Okay. Right?

21 MR. MILLER: Yes, Your Honor. And again, moving
22 very quickly through this, Judge Peck recognized this in the
23 excerpt we had here.

24 And I'm just going to go to the bottom of the
25 highlight here, where he said that if this ever gets to an

1 evidentiary hearing, Spanish Broadcasting will have an
2 extraordinarily difficult time proving causation. And that
3 is the issue about which we are having trouble in discovery
4 is the discovery on the proof of causation.

5 Tab 3, which we can skip quickly, is the 2 prior
6 extensions, which were -- 3 prior -- 2 prior extensions,
7 which were agreed to, Your Honor. And then, clearly, Tab 4
8 was the declaration of Mr. Garcia, the CFO. And he explains
9 that this is a diminution by comparison claim.

10 He says that they're going to compare their
11 performance with the performance of their competitors. And
12 everything that's left over is going to be because they
13 didn't have this \$4 million in 2008.

14 Well, gee whiz, there's a lot of good news and a
15 lot of bad news in the financial condition of this company.
16 And that's what we're trying to understand.

17 They made decisions not to buy things. They made
18 decisions where to spend money.

19 THE COURT: Sure.

20 MR. MILLER: They had a lot of money on their
21 books. For all those reasons, for them to now say well, gee
22 whiz, this is a lot of documents we're having to produce --
23 the point is they've asked for this, Your Honor. And
24 they're going to get 68 percent already. This is their
25 third -- Tab 5.

1 This particular debtor, Lehman Commercial Paper,
2 is going to distribute over 68 and a fraction percent of
3 claims that are allowed. When you multiply that by the 39.6
4 million, it's a little over \$27 million. So we're talking
5 about a \$27 million cash claim.

6 And what essentially Spanish Broadcasting has said
7 -- go to the next Tab 6 -- is that they got a search term,
8 which is the key search term, by the way, that produced
9 several hundred thousand preliminary hits. Now, this is
10 before people have looked at them to eliminate the pizza
11 menus and the other junk.

12 And a lot of it is signature lines.

13 THE COURT: So that's what I want to go to. I
14 mean, you say that 80 percent is irrelevant. How do you
15 know that?

16 MR. OTCHIN: Your Honor, we sampled random
17 documents that were retrieved by the search term, and, based
18 on the sampling of the document that we sampled, 80 percent
19 were irrelevant and 20 percent we determined were
20 responsive.

21 THE COURT: Okay. So when did you do that?

22 MR. OTCHIN: We sampled it -- well, after we had
23 reached agreement on the search term, working with Spanish
24 Broadcasting's outside vendor, you know, it was, you know,
25 within several weeks of that agreement.

1 THE COURT: Well, if you agreed on the search
2 terms on March 5th -- now it's almost the beginning of May.
3 So I'm just -- I'm not accounting for the time.

4 MR. OTCHIN: Well, beyond, you know, taking the
5 search terms and, you know, getting to the end point with
6 those documents to review, there was technical issues with
7 respect to what Spanish Broadcasting could process in-house
8 versus, you know, what the vendor had to come in and
9 retrieve -- extract documents and then, you know, run the
10 terms. And, you know, there was a certain technical
11 process.

12 THE COURT: But this is where you're going to have
13 to help me. I mean, if you agree that the search is
14 producing junk, then you have to come back and tell
15 Mr. Miller how you're going to refine the search that will
16 still produce -- to be clear, I agree with the plan
17 administrator about the documents to which they're entitled.

18 You're making a hugely sweeping claim. You're
19 essentially opening -- you're making a claim that implicates
20 the performance of the bank during a particular period of
21 time. So you've got to produce documents that show that.

22 It can't be producing what you --

23 MR. OTCHIN: No, no, we don't disagree with that
24 at all, Your Honor.

25 THE COURT: Yeah. So how do you get that?

1 MR. OTCHIN: So, starting at March 5th, which is
2 when we had agreement on the search terms, --

3 THE COURT: Right.

4 MS. PRIMOFF: -- they originally thought that in-
5 house they would be able to do this. We look at the search
6 terms. They turned out to be incredibly complicated and
7 beyond the capabilities of Spanish Broadcasting's internal
8 people.

9 So then, they retained a vendor to run the
10 searches. Until the vendor downloaded the stuff from
11 people's email servers as well as the shared drive, that
12 took a bit of time. They ran the searches.

13 It turned out to be problematic over a course of a
14 whole bunch of terms. But there's this one term in
15 particular.

16 THE COURT: What's the term?

17 MS. PRIMOFF: It's in --

18 UNIDENTIFIED SPEAKER: It's in this tab,
19 Your Honor. It's highlighted here.

20 MR. MILLER: Do you have the letter that we sent
21 to you today?

22 THE COURT: Yeah.

23 MR. MILLER: If you have the letter that we sent
24 to you today, --

25 THE COURT: Right.

1 MR. MILLER: It's in Footnote 1 for page 2.

2 THE COURT: Okay. All right. So --

3 MR. MILLER: So that term alone has returned in
4 excess of 300,000 documents.

5 THE COURT: Right. But here's the part I don't
6 understand. Just because it returns a large number of
7 documents doesn't mean that it's a bad search term.

8 MS. PRIMOFF: We agree. So we sampled the
9 documents. But 80 percent of the documents are completely
10 non-responsive and irrelevant. So we worked with the vendor
11 to modify -- to see whether we could develop a modified term
12 that would reduce the number of irrelevant and non-
13 responsive documents.

14 And that modified term is set forth in Footnote 2.
15 And this is what we --

16 THE COURT: Footnote 2 to what?

17 MS. PRIMOFF: To the letter that was sent to
18 Your Honor this morning.

19 THE COURT: Okay. Modified terms step two?

20 MS. PRIMOFF: Consistent with two-step search.

21 And even that search retrieves nearly 40 percent non-
22 responsive documents. But we can't seem to do any better
23 than that. So we accept that that's what it needs to be.

24 But the difference between 40 percent non-
25 responsive and 80 percent non-responsive is enormous. We

1 think that the term that's set out in Footnote 2 is an
2 appropriate term.

3 MR. MILLER: The problem with the modified search
4 term, Your Honor, is all the not terms in it. Not terms
5 remove very valuable things. If you take out not present
6 (ph) of operations, correct (ph) of operations or
7 consolidated operations or operations manager, you've
8 essentially excluded certain custodians.

9 And the same is true not value or evaluate, not
10 viable, be viable condition or liquid (ph). I mean, you
11 know, one of those -- if you have nots on all of those
12 terms, you're punching holes in the search that only humans
13 can deal with.

14 I mean, a computer can only do so much. And,
15 frankly, a 20 percent yield in a \$27 million case on a key
16 search term is not junk. We're not talking five percent or
17 seven percent. We're talking one out of five.

18 And they're the plaintiff. And this is their
19 central damage claim. So we just don't think that this is
20 unreasonable.

21 THE COURT: I just don't -- you're going to have
22 the burden to prove your damages.

23 MS. PRIMOFF: Yes.

24 THE COURT: So do you have a universe of documents
25 -- let's try to back into this. Do you have a universe of

1 documents that you think demonstrates your damages?

2 MS. PRIMOFF: Yes.

3 THE COURT: Have you produced those?

4 MS. PRIMOFF: Yes.

5 THE COURT: Do you have those, Mr. Miller?

6 MR. MILLER: We have a production, and the point
7 of whether they show the damages -- what we understand, as I
8 say, that they're doing is a diagnosis by elimination. They
9 are saying, essentially, you know, we didn't do as well as
10 our peers did. Therefore, it must have been the \$4 million.

11 What we don't have is the -- we don't believe that
12 the documents of all the problems they have. That's what we
13 have to get. And that's what we think these search terms
14 are going to be able to help us find.

15 We need to understand what their difficulties
16 were. We also need to understand how much other cash they
17 had.

18 One important point --

19 THE COURT: So an alternative theory of causation
20 for the damages that they (indiscernible)?

21 MR. MILLER: Yes. And also, Your Honor, they
22 withdrew any damages based on seeking alternate financing.
23 That's the normal direct damages for a failure to fund is so
24 you had funding at five percent. And you had to go out and
25 get funding at seven percent. So you got two percent

1 increase in damages. That's fine.

2 They've withdrawn that. They didn't seek
3 alternate claims (ph). We think that's because they didn't
4 actually need the financing, because they have a lot of
5 assets.

6 They were not capital starved. They had other
7 problems. So it is an alternate theory.

8 Yes, they didn't perform as well as it appears.

9 THE COURT: Well, but --

10 MS. PRIMOFF: Well, we did seek alternate
11 financing. It wasn't available in the marketplace. And I
12 think, respectfully, that Mr. Miller misstates the law.

13 The law is not that we produce 1 out of 5 -- or,
14 in this case, 20 percent when 80 percent are non-responsive.
15 That's a classic case for caution. We have demonstrated
16 through sampling that 80 percent of the documents are non-
17 responsive. You have to weigh the burden.

18 THE COURT: But you -- but the terms -- I mean, my
19 immediate reaction was to -- if you're going to carve out
20 financial officer (ph), you're going to carve out those
21 terms. You're --

22 MS. PRIMOFF: But anytime that somebody has a
23 signature block, Your Honor, that says V.P. of operations,
24 that comes up on the original search. Okay?

25 THE COURT: But I don't -- again, this is not -- I

1 am not an expert in VSI discovery. But it seems to me that
2 there has to be a way of dealing with that problem, isn't
3 there?

4 MR. MILLER: There is, and Mr. Woolverton is here
5 with us, supervised our review. When stuff pops up on the
6 screen and contract attorneys look at it and they're very
7 fast at being able to zap documents, because it's obviously
8 trash.

9 But, if it's a long document and it's discussing
10 their financial operations, it needs to go over into a stack
11 and be considered responsive. That's what we're talking
12 about here.

13 And the fact that I get, again, some higher yield
14 because of signature blocks, I can deal with that.

15 THE COURT: Understood. I do not understand how
16 it could be appropriate to carve these terms out. And you
17 are gutting the production.

18 MS. PRIMOFF: Well, it's the guidance here,
19 Your Honor. And, in that balance thing, we're not obligated
20 to, you know, review a document set that's retrieving 80
21 percent non-responsive documents.

22 The idea is to have electronic search terms that
23 lead to responsive documents. So it's a balancing and
24 questioning is warranted in circumstances like this if they
25 insist on that level.

1 (Pause)

2 MR. MILLER: Your Honor, one other issue that we
3 want to stress --

4 THE COURT: I mean, what's going on, though, is
5 that -- I mean, in the letter that came in today, you say
6 Spanish Broadcasting has produced 600,000 pages of
7 documents, 3 times more than the 200,000 that Lehman has
8 filed (ph). That's completely irrelevant.

9 The relative number of the documents that you've
10 produced is completely irrelevant. But I think that that's
11 part of what's going on is that you feel that the burden is
12 greater on you. But --

13 MS. PRIMOFF: No, no, we accept that the burden --
14 the documents are what they are.

15 THE COURT: You're making an enormous claim with a
16 very -- with a theory that is, by its nature, somewhat
17 broad. I have no idea of the merits.

18 And the fix for the over-broad seems to me to be
19 it's not a scalpel. I mean, it's a really big knife. And I
20 hear you on the balancing, but I don't understand -- then
21 they will then search only the documents --

22 MR. MILLER: Only what's in step one. And all not
23 terms recorded (ph).

24 THE COURT: Right. So that's narrowing it
25 further.

1 MR. MILLER: Your Honor, you mentioned a scalpel.
2 There is a potential scalpel here.

3 THE COURT: Well, I'm looking for the scalpel
4 because that's why --

5 MR. MILLER: Okay. Well, it's not --

6 THE COURT: -- (indiscernible).

7 MR. MILLER: -- something that we've all
8 discussed. But the scalpel is this consequential damage
9 waiver. The only documents that are really relevant to
10 that, we think, are documents between these law firms over a
11 so-called payoff letter. And that would have been the
12 drafts.

13 And we agree in principle to a protocol for
14 exchanging those. And, if those do not reveal ambiguity in
15 this payoff letter, which they say did away with the
16 consequential damages waiver, then the plan administrator
17 believes it could come to the Court with a letter seeking a
18 summary judgment.

19 If the Court granted summary judgment on that, --

20 THE COURT: Then we're done.

21 MR. MILLER: -- then we don't have to look at the
22 650,000 documents. We don't have to look at any of this
23 stuff, because we think at that point, we're done. So
24 that's the scalpel, if the Court wants to consider a
25 scalpel.

1 MS. PRIMOFF: They've made this argument to
2 Judge Peck already in connection with their motion to
3 dismiss. And they didn't prevail on this argument. So
4 we're entitled to discovery.

5 MR. MILLER: No.

6 MS. PRIMOFF: Let's talk about the discovery.
7 And, if Your Honor believes that we should --

8 THE COURT: Was there a motion to dismiss?

9 MS. PRIMOFF: Yes. And with Judge Peck?

10 THE COURT: No, no, no.

11 MS. PRIMOFF: No, no, no. Judge Peck -- we have
12 judge --

13 THE COURT: The sufficiency hearing.

14 MS. PRIMOFF: The sufficiency hearing, which the
15 footnotes in your document said was to be determined under
16 the standard of a motion to dismiss.

17 MR. MILLER: And, if you look on the second tab,
18 page 1.3 at the bottom, what Judge Peck said was, "I am not
19 going to rule today on the waiver consequential damages,
20 even though I might be able to. Given the benefit of the
21 doubt fully to Spanish Broadcasting under 12(b)(6) standard,
22 they will get their day in court, or we will deal with this
23 on dispositive motions after discovery."

24 Now, I suggest that we are now at the point after
25 discovery. If you just get the discovery on this issue,

1 that a dispositive motion comes around (ph). And so, I
2 don't think Judge Peck ruled that it was not a summary
3 judgment. He ruled he was not going to do it on 12(b)(6),
4 just to be precise.

5 THE COURT: Thank you. Sounds good to me.

6 MS. PRIMOFF: I don't agree with that at all. He
7 denied their motion. He said that we were entitled to
8 discovery. He talked about expert discovery. And to do
9 this piecemeal, --

10 THE COURT: No, but expert discovery is about the
11 amount of damages.

12 MS. PRIMOFF: Yes.

13 MR. MILLER: Right.

14 THE COURT: Right.

15 MS. PRIMOFF: And he ruled that we were entitled
16 to prove our amount of damages.

17 THE COURT: He didn't. He said I am not going to
18 rule on the waiver of consequential damages.

19 MS. PRIMOFF: He was reserving it.

20 THE COURT: He gave -- he denied the 12(b)(6) and
21 said they will get their day in court, or we'll deal with
22 this on dispositive motions after discovery. So what
23 Mr. Miller is saying is there has been discovery around the
24 threshold issue. There's a factual issue. Was there a
25 waiver, right?

1 And now, he wants -- he's saying we'll put in a
2 summary judgment motion saying there are no issues of
3 material disputed fact around that issue. That's what this
4 says, that you, on the 12(b)(6), you'd have the benefit of
5 the doubt on what you pleaded. Right?

6 You survived the motion to dismiss. You stated
7 the claim. Discovery. Next thing that happens is trial or
8 summary judgment.

9 He's saying summary judgment in favor of the plan
10 administrator on the issue that there was a waiver, right?

11 MR. MILLER: That's right. And that will take
12 out, essentially, everything that amounts to anything in
13 this case, we believe. It will take out -- now, I
14 understand they say it's direct damages. But whether it's
15 direct damages or consequential damages is not a part of
16 discovery.

17 THE COURT: It doesn't matter if it's -- right.

18 MR. MILLER: And so, you know -- and, by the way,
19 the fee issue is really a tiny flea on the dog. There's a
20 fee at issue of 300.

21 They asked for 273,000. We think it's really
22 13,000. Whatever it is, we think the fees we can take care
23 of. They get it. They would get a refund of any unearned
24 fees that they would try to (indiscernible).

25 There's nothing left if consequential damages is

1 resolved, including no need to have discovery on this whole
2 damage area. No need to have experts, which everybody is
3 retaining and is very expensive.

4 THE COURT: Judge peck's comments are in the same
5 paragraph. His beginning thought was on the waiver of
6 consequential damages. So it wasn't discovery -- it wasn't
7 going to be all dispositive motions after globally
8 discovery.

9 It seems to me the context seems to suggest that
10 it would be dispositive motions on that threshold issue. So
11 we already did that.

12 MS. PRIMOFF: But, Your Honor, you know, I'm
13 assuming that the transcript in front of Judge Peck was at
14 least 144 pages, of which we have here 4 selected pages.

15 THE COURT: If you want to send me the whole
16 transcript and I'll review the whole transcript and --

17 MS. PRIMOFF: I do have it here.

18 THE COURT: -- if it changes my mind, --

19 MS. PRIMOFF: Okay.

20 THE COURT: -- I'm happy to do that. But, I mean,
21 this is this chicken and egg problem that we all have in
22 these situations. And this seems to me one in which I want
23 to at least explore the ability to do -- dispose of it on
24 the summary judgment.

25 And I'm not -- you know, I think that these folks

1 -- you're not here as often. I'm not a big fan of summary
2 judgment motions, because I think most of the time they're
3 not meritorious.

4 But this one seems to me to be a good candidate
5 for it, because then I don't have to go, among other
6 reasons, among other reasons, we don't have to go through
7 all that.

8 He may not convince me. In which case we're going
9 to be back to fighting over search terms.

10 But it's inconsistent with the general theme of
11 you're dragging your feet, let's go. Would there not be a
12 suggestion let's do a dispositive motion. So that's why I'm
13 giving it weight, because I think that it wouldn't be
14 suggested if it was something that was designed to just, you
15 know, delay.

16 They're against delay. They say you're in favor
17 of delay.

18 MS. PRIMOFF: You're not in favor of delay. We're
19 entitled to \$50 million (indiscernible).

20 THE COURT: Sure, you are.

21 MS. PRIMOFF: Sure, we're entitled to delay. No,
22 we don't want delay.

23 THE COURT: (Indiscernible.)

24 MS. PRIMOFF: We want money.

25 THE COURT: Right. But I'm happy to review the

1 whole transcript.

2 MS. PRIMOFF: I mean, the other thing is that
3 typically, there's one summary judgment motion. So, if
4 they're going to make their one, this should be the one.

5 THE COURT: Well, there is one -- I mean, there's
6 not always just one. There's one on the threshold issue of
7 whether or not your legal entitlement was waived.

8 Thank you.

9 MR. MILLER: There's two copies for you and -- and
10 this is actually -- well, this is the excerpt on this part
11 of the hearing. There was other things that day, I think.

12 I think, obviously, you're not going to get it
13 now. But, just for convenience, let me give a copy to him.

14 THE COURT: Okay. So, I mean, it's not a written
15 (ph) page (ph).

16 MR. MILLER: I don't know what --

17 THE COURT: It's numbered, but that's because
18 there are probably other matters on the calendar.

19 MR. MILLER: Okay.

20 THE COURT: Okay?

21 MR. MILLER: All right. I know you have to go,
22 Your Honor, but --

23 THE COURT: I think we ought to do that. I mean,
24 if there's something in here in the rest of the transcript
25 that you think undercuts what it seems to me Judge Peck

1 clearly said -- but just independently, whatever -- even if
2 he didn't say that, it seems to me that, if there's a
3 dispositive motion that says here's what happened between
4 the parties. We've all had discovery on that. They waive
5 their claim.

6 MS. PRIMOFF: This is dated February 2013. I
7 would like to go back and have the opportunity to review it,
8 Your Honor.

9 THE COURT: Sure, that's fine.

10 MS. PRIMOFF: And, if that's how Your Honor wants
11 to proceed, then naturally, we'll proceed as you want.

12 MR. MILLER: I think that makes sense, Your Honor.

13 THE COURT: I think that's a better way. Mind
14 you, I have no idea how it's going to turn out. I mean,
15 I've expressed my general skepticism about summary judgment
16 motions. But sometimes they work. Sometimes they don't.

17 But, in general, without making a decision, I
18 mean, I think that when there's a damage here like this,
19 it's going to be very hard to deal with the discovery issue,
20 because it's so raw (ph). And one answer might be to, you
21 know, have a group of contract attorneys, whoever it is that
22 you're hiring, you know, wallow (ph) through it.

23 I know it's a lot of documents, but cutting it off
24 this way would seem to me to be not using a scalpel and
25 would create a risk that things were missed. And I'm not

1 doubting the good faith proffer with respect to sampling,
2 but I'm a sampling skeptic.

3 You have to demonstrate to me that your sampling
4 technique -- you know what I'm talking about, don't you,
5 Mr. Miller?

6 MR. MILLER: Yes, I -- we get a lot of sampling
7 cases.

8 THE COURT: Right. You have to demonstrate to me
9 that you are validly sampling.

10 I understand statistical sampling is a valid means
11 of taking a smaller segment and predicting. But, before you
12 say, "Oh, we sampled and look, this is what happened," you
13 have to demonstrate to me that your sampling was valid,
14 right?

15 So I don't get there by simply being told based on
16 our sample, this is no good. I'm not suggesting that it was
17 anything but in good faith.

18 Do you understand?

19 MS. PRIMOFF: Yeah, we're not complaining about
20 reviewing a lot of documents.

21 THE COURT: Yeah.

22 MS. PRIMOFF: We're complaining about reviewing a
23 lot of --

24 THE COURT: Valid. Guess what? You're
25 complaining about reviewing a lot of --

1 MS. PRIMOFF: Irrelevant documents. But, if we
2 need to give you better sampling, we'll give you better
3 evidence of sampling.

4 THE COURT: Okay. Well, maybe we won't have to
5 get there at all.

6 Now, you don't think that you've got -- there is
7 no cross-motion for summary judgment?

8 MR. MILLER: Your Honor?

9 THE COURT: You couldn't --

10 MR. MILLER: You know, first of all, we rejected
11 the contract.

12 THE COURT: Right.

13 MR. MILLER: So we're not saying that we have a
14 defense to whatever damages there are.

15 THE COURT: Sure, right.

16 MR. MILLER: We admit liability, if you will.

17 THE COURT: Yes.

18 MR. MILLER: We just believe that the only damages
19 are about \$15,000 if all she -- all they get is direct
20 damages.

21 THE COURT: I'm just confirming that we're going
22 to not leave. And then, I was going to get correspondence
23 saying we'll cross move for summary judgment. There is no
24 cross-motion for summary judgment. There is their motion
25 saying, as a matter of law, you're not entitled -- an

1 undisputed fact you're not entitled to your greater damage
2 claim, right?

3 MR. MILLER: That's right, Your Honor.

4 THE COURT: You're not going to file a motion back
5 that says, as a matter of law, we're entitled to X amount of
6 damages. If the plan administrator doesn't knock you out
7 entirely, we'll come back to this.

8 MS. PRIMOFF: Understood.

9 THE COURT: Yeah, that's right. That's right.

10 MS. MARCUS: One more thing I think we need to
11 deal with, Your Honor.

12 THE COURT: Yes. Well, the 29th? No, not even.

13 MS. MARCUS: The parties have agreed with respect
14 to the discovery items on the waiver. But I don't think
15 we've actually exchanged those documents yet. So we should
16 talk about how much time --

17 MR. MILLER: We need --

18 MS. MARCUS: (Indiscernible.)

19 MR. MILLER: We have a deadline for that exchange.

20 MS. MARCUS: Okay. And everything else is stayed
21 pending this.

22 UNIDENTIFIED SPEAKER: Everything else --

23 MS. MARCUS: Pending this.

24 MR. MILLER: Okay.

25 What do you think? Two weeks? Three weeks?

1 I mean, what we've agreed, Your Honor, --
2 actually, we have an exchange of emails. But what we
3 proposed was email exchanges externally between these firms
4 and their attachments so that we can see what drafts were
5 sent in the payoff letter. And this is about the payoff
6 letter, which is --

7 THE COURT: Right.

8 MR. MILLER: -- the document that they set aside
9 --

10 THE COURT: Right. So there aren't attorney sign
11 (ph) issues?

12 MR. MILLER: Well, because these have been
13 external emails, Your Honor. They're all -- we sent them
14 what they sent us. These are (indiscernible) and produce
15 our sets in the attachments.

16 THE COURT: Okay.

17 MR. MILLER: And then, we'll have all the drafts
18 of the payoff letter. We'll have all the emails back and
19 forth on the payoff letter.

20 THE COURT: External, not internal?

21 MR. MILLER: And we -- external, not internal.

22 THE COURT: Not internal? Oh, great.

23 MR. MILLER: And we think that's -- we think we
24 can look at that and determine whether there is a summary
25 judgment or not.

1 THE COURT: Okay. So that's --

2 MR. MILLER: And we've looked at our --

3 THE COURT: -- one step better.

4 MR. MILLER: Yes.

5 THE COURT: I mean, you're saying you're not --
6 you think there is, but you're not sure.

7 MR. MILLER: Yes, Your Honor, until we complete
8 this exchange -- and they said they wanted to -- although
9 they agreed in principle, they felt that that should wait
10 until the general extension and be governed by general
11 (indiscernible) discovery.

12 THE COURT: I gotcha.

13 MS. PRIMOFF: But we've agreed.

14 THE COURT: I gotcha. Okay. No, but there's a
15 fine point to what you're saying, which I like, which is
16 that you think that you'll have a summary judgment motion.

17 MR. MILLER: Yes, Your Honor.

18 THE COURT: And, in good faith, you're going to
19 review the documents.

20 MR. MILLER: Yes.

21 THE COURT: And, after you do that, if there's a
22 --

23 MR. MILLER: And we'll let the Court know very
24 promptly if we decide there's not.

25 THE COURT: All right. And then, we'll have to

1 either -- we'll have to agree on this, or we'll have to
2 reconvene.

3 MR. MILLER: Yes. But the question, I guess, is
4 can we get agreement on how long we're going to take to
5 exchange those emails.

6 THE COURT: Right, right. Do you not --

7 MR. OTCHIN: I think two weeks we should be able
8 to do it.

9 THE COURT: Two weeks?

10 MR. MILLER: I'm saying (indiscernible).

11 THE COURT: Right.

12 MR. MILLER: But we can get ours in two weeks,
13 right? I think we've actually pulled ours, right?

14 Okay? So that's good. In two weeks.

15 THE COURT: Okay.

16 MR. MILLER: And we can very promptly, within,
17 say, two weeks, advise the Court on when we're going to be
18 seeking. And we'll send a letter, as we are supposed to, --

19 THE COURT: Right.

20 MR. MILLER: -- requesting summary judgment.

21 THE COURT: So this will -- but this can suffice
22 as a 756(1) conference. You could just make a formal
23 letter.

24 MR. MILLER: Okay.

25 THE COURT: Just letting us know what the schedule

1 is (indiscernible).

2 MR. MILLER: Okay.

3 THE COURT: (Indiscernible) a schedule
4 (indiscernible) a hearing (indiscernible).

5 MR. MILLER: Great.

6 THE COURT: All right. So that's a good thing.
7 Okay.

8 MS. PRIMOFF: Okay.

9 THE COURT: Okay.

10 MR. MILLER: Thank you, Your Honor.

11 THE COURT: Thank you very much. I'm going to --

12 MR. OTCHIN: Thank you, Your Honor.

13 THE COURT: Can I keep all this?

14 MR. MILLER: Of course.

15 I appreciate you making time for us, Your Honor.

16 THE COURT: Sure, sure.

17 (Proceedings were concluded at 2:34 PM)

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C E R T I F I C A T I O N

I, Nicole Yawn certify that the foregoing transcript is a
true and accurate record of the proceedings.

Nicole Yawn

Digitally signed by Nicole Yawn
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